

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
DAMARIS TOVAR
Applicant

Damaris Tovar
Juan Carlos Garzon
For the Application

Etai Neuman
Opposing the Application

Before: Lynn A. Robeson, Hearing Examiner

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OZAH Case No. CU 17-10

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

On December 13, 2016, the Applicant, Damaris Tovar, filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children at 6015 Johnson Avenue, Bethesda, MD. Ms. Tovar currently operates a Family Day Care (i.e., Smart Kids Bilingual Learning Center) for up to 8 children from the home. She resides on the property and co-owns the day care business with Mr. Juan Garzon. The owner of the property, Mr. Iraj Ektabani, submitted a letter consenting to the application. Exhibit 2. As part of the conditional use application, Ms. Tovar also requested a waiver of three of the minimum number of parking spaces normally required for the use as proposed and a waiver from the requirement for one permanent bicycle storage space. Exhibit 27. The subject property described as Lot 9 in the Ayrilawn Subdivision and is zoned R-60. Exhibit 18. Child care facilities up to 12 individuals must be approved by conditional use under §59-3.4.4.D and §7.3.1. of the Montgomery County Zoning Ordinance.¹

On February 3, 2017, the Office of Zoning and Administrative Hearings (OZAH) sent notice of a public hearing to be held on March 20, 2017. Exhibit 26. Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on February 17, 2017, recommending approval of the application subject to the following conditions (Exhibit 27):

1. The day care facility is limited to up to 12 children and 3 non-resident employees.
2. The hours of operation are Monday through Friday from 6:45 a.m. to 6:00 p.m.
3. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m.
4. The Applicant must [enter] [sic] into an agreement with each parent and staff to specify assigned arrival and departure times that must be staggered into separate groups. At full capacity, arrival/departure groups must be structured as follows:
 - a. Group A (up to 5 cars) 6:45 a.m. – 8:30 a.m.; 4:00 p.m. – 4:30 p.m.

¹ All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

- b. Group B (up to 5 cars) 8:30 a.m. to 9:00 a.m.; 4:30 p.m. to 5:00 p.m.
- c. Group C (up to 5 cars) 9:00 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m.
Morning drop-off may extend beyond 9:30 a.m., but must not begin before 6:45 a.m.; afternoon pick-up may begin before 4:00 p.m. but must not extend beyond 6:00 p.m.

The Planning Board met on March 2, 2017, and voted unanimously to recommend approval of the conditional use with the conditions recommended by Staff. It also approved the waivers for the number of parking and bicycle storage spaces. Exhibit 28.

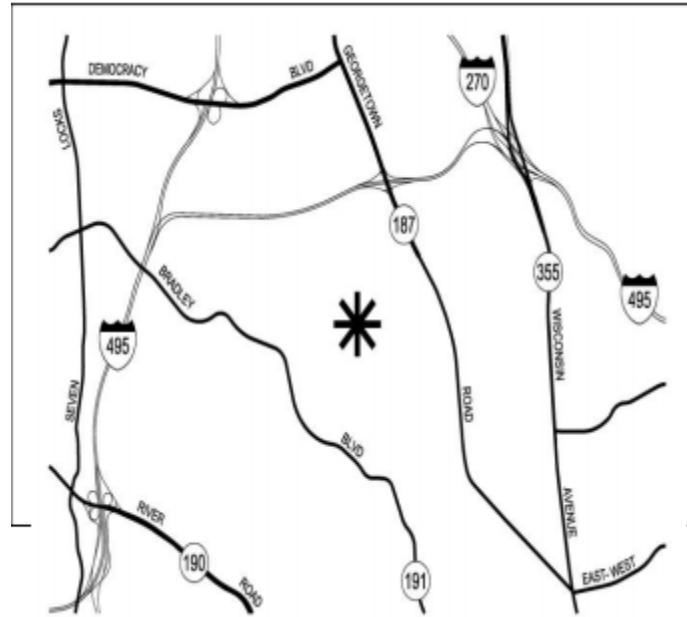
The public hearing proceeded as scheduled on March 20, 2017. Ms. Tovar and Mr. Garcon appeared in support of the application. Ms. Tovar adopted the findings and conclusions of the Staff Report as her own testimony and agreed to abide by the conditions of approval recommended by Staff. Mr. Etai Neuman, who lives directly across Johnson Avenue from the daycare, testified against the application because traffic from school buses during peak drop-off times for the day care made it difficult to get out of his driveway. His testimony is detailed in Part II.D. of this Report.

For the following reasons, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV of this Report.

II. FACTUAL BACKGROUND

A. The Subject Property and Vicinity

The subject property is located on the northeast corner of the intersection of Johnson Avenue and Ewing Drive in Bethesda. A vicinity map from the Staff Report, reproduced on the following page, shows its general location (Exhibit 27, p. 2). Staff advises that the Johnson Avenue roadway is 25-feet wide with one 12-foot wide travel lane in each direction. However, at the public hearing, both Ms. Tovar and Mr. Neuman (who lives across the street on Johnson Avenue)



**Vicinity Map
Exhibit 27**

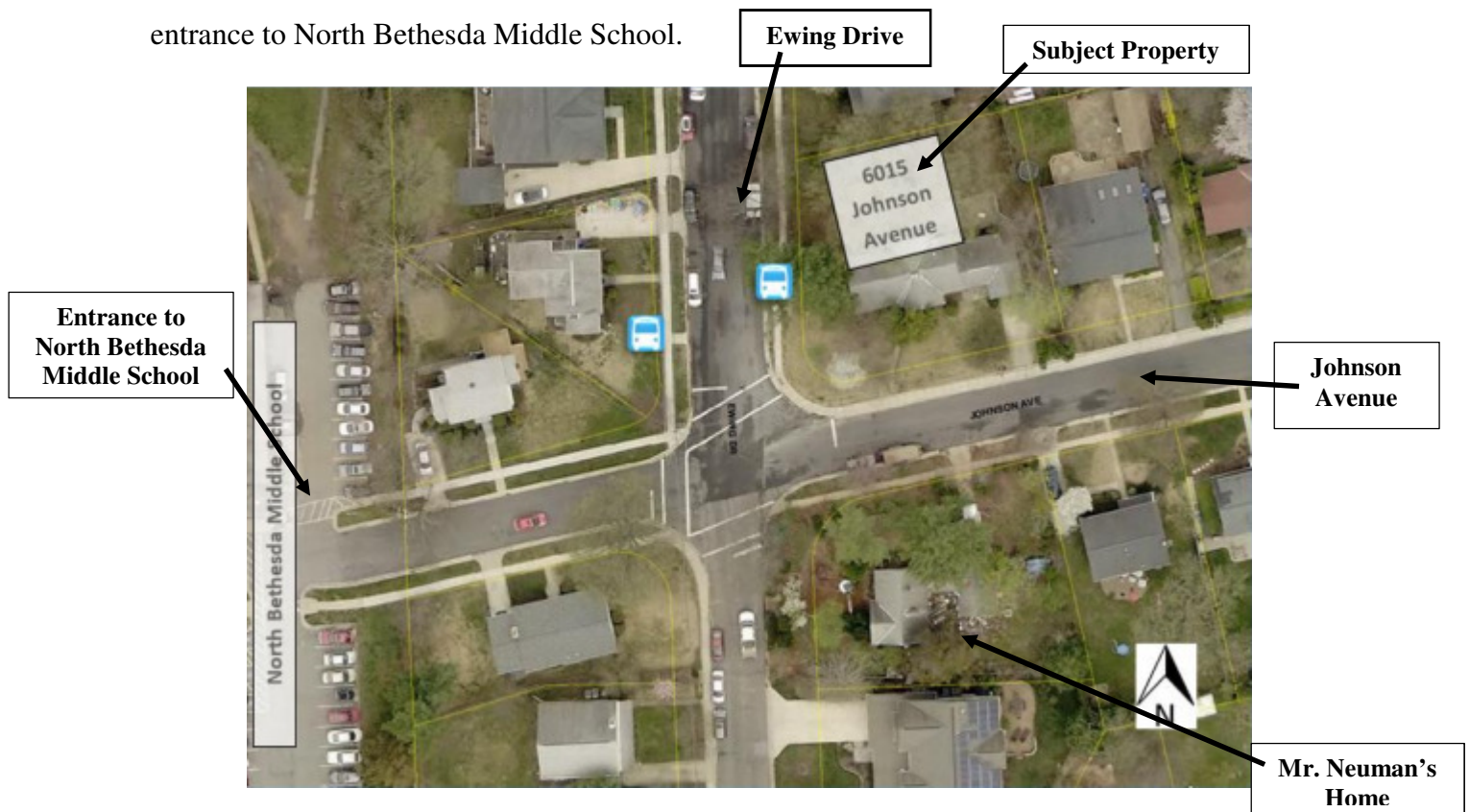
acknowledged that the street is wide enough only for one vehicle or school bus to go through when there are cars parked on both sides of the road. T. 22-23. Parking is permitted on Johnson in front of the subject property, but is prohibited from 7:00 a.m. to 4:00 p.m. on the next block to the west. This is because Johnson Avenue terminates at the entrance of North Bethesda Middle School and there is insufficient width to accommodate parked cars and the turning radius that buses need to enter the middle school parking lot.

Ewing Drive runs generally north/south and has a 36-foot pavement width with one 13-foot travel lane in each direction. Parking is permitted on both sides of Ewing Drive. Transportation Staff further stated (Exhibit 27, p. Attachment B):

The Johnson Avenue/Ewing Drive Intersection, located immediately west of the site, is configured as a four-way stop-controlled intersection. Crosswalks are present at the north, south, and west legs of the intersection. Johnson Avenue and Ewing Drive are part of a street network that forms a grid with other primary and secondary residential streets. Henning Street and Conway Road are located south and north of Johnson Avenue, respectively. Lindale Drive is located a block east from the site and parallels Ewing Drive for several blocks. This grid network will

allow parents to access and exit the site from multiple directions. Parents exiting the site have multiple options to access the higher volume collectors without making difficult turning maneuvers. After assessing the street connectivity, staff does not anticipate the net new trips generated by the condition having an adverse impact on the adjacent street traffic.

An aerial photograph from the Staff Report (Exhibit 27, Attachment B) shows the subject property, Mr. Neuman's property, the intersection of Johnson Avenue and Ewing Drive, and the entrance to North Bethesda Middle School.



The subject property itself contains approximately 11,580 square feet. It is a corner lot with approximately 95 feet of frontage on Johnson Avenue and 87 feet of frontage on Ewing Drive. It is improved with a 1-story single-family detached dwelling with an attached one-car garage. There is a driveway with a narrow apron that opens up space for two vehicles to park side-by-side and a single-car garage. Staff reports that there are “numerous” large and healthy deciduous trees in the front and rear yard. Concrete stairs and a walkway lead from the sidewalk on Johnson

Avenue to the front door. Small solar light fixtures illuminate the stairs. A light fixture next to the main front door also provides illumination. Staff advises that the rear yard is enclosed with a 4-foot high chain link fence. Large evergreens screen the rear yard from abutting properties.

Photographs of the property are reproduced below (Exhibit 27):



Johnson Avenue



**Ewing Drive
(Bus Stop Circled)**

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff defined the boundaries of the surrounding neighborhood as Wilmett Road and Adelaide Drive to the north, Hempstead Avenue and Burley Drive to the east, Greentree Road to the south and Bulls Run Parkway and Ridge Road to the west. Exhibit 27, p. 3.

Staff characterized the neighborhood as consisting of single-family detached residential properties in the R-60 Zone. *Id.* There are four special exceptions for accessory apartments within the defined area, approved between 1984 and 1997. An aerial photograph depicting the boundaries of the surrounding neighborhood as defined by Staff is shown below (Exhibit 27):



The Hearing Examiner agrees with Staff that the neighborhood consists primarily of single-family detached homes in the R-60 Zone, some with ancillary accessory apartments, as demonstrated by the photograph above.

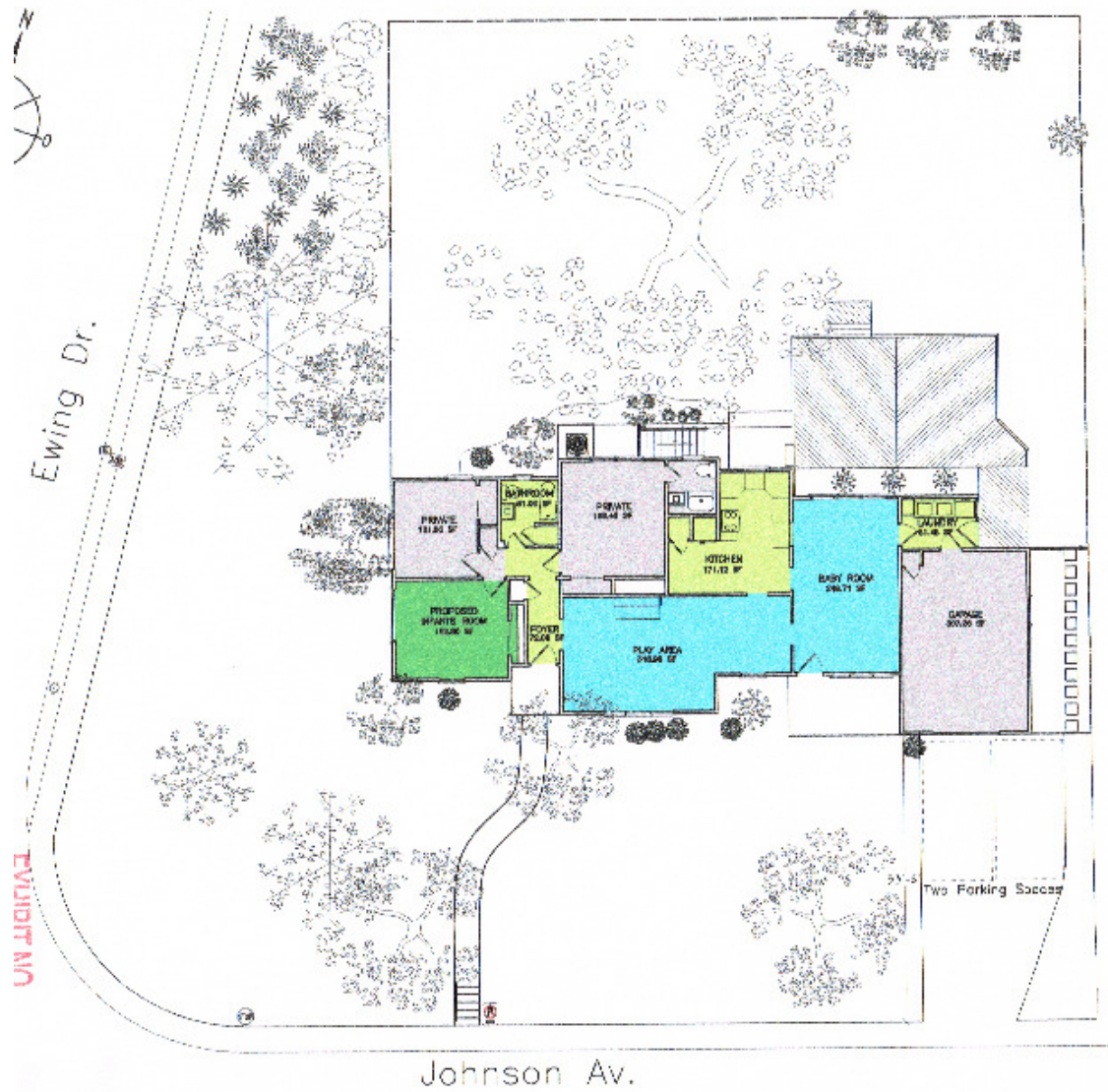
C. Proposed Use

Ms. Tovar has operated a family day care for up to 8 children at the home since August, 2015. The business is co-owned by Mr. Juan Carlos Garzon and his wife. T. 8. Ms. Tovar and her husband live in the home; Mr. Garcon and his wife live elsewhere. Ms. Tovar testified that she has experienced a large demand for her services, particular from parents who want siblings to attend the same daycare, thus prompting her request to expand up to 12 children.

1. Site Plan, Landscape Plan and Lighting Plan

The following color coded conditional use site plan (Exhibit 17(c)) shows the layout of the day care within the home as well as exterior areas used for outdoor play and access. The day care will operate within approximately 1,000 square feet of the first floor of the home. The exterior play area consists of approximately 4,000 square feet in the rear yard. Exhibits 17(c) and (d). The Applicant proposes no changes to the existing lighting, which consists of the small solar lamps leading to the front door, and the fixture above the garage. Nor does she propose any signage for the day care. Exhibit 27, p. 5.

There will be no change to the existing landscaping on the property. This includes large deciduous trees in the front and rear yards and large evergreens along the northern property line. A four-foot fence covered with deciduous vine surrounds the rear play area. A Landscape and Lighting Plan that shows in detail the layout of the exterior area used for the conditional use (Exhibit 17(b), on page 11).



SQUARE FOOTAGE CALC'S:

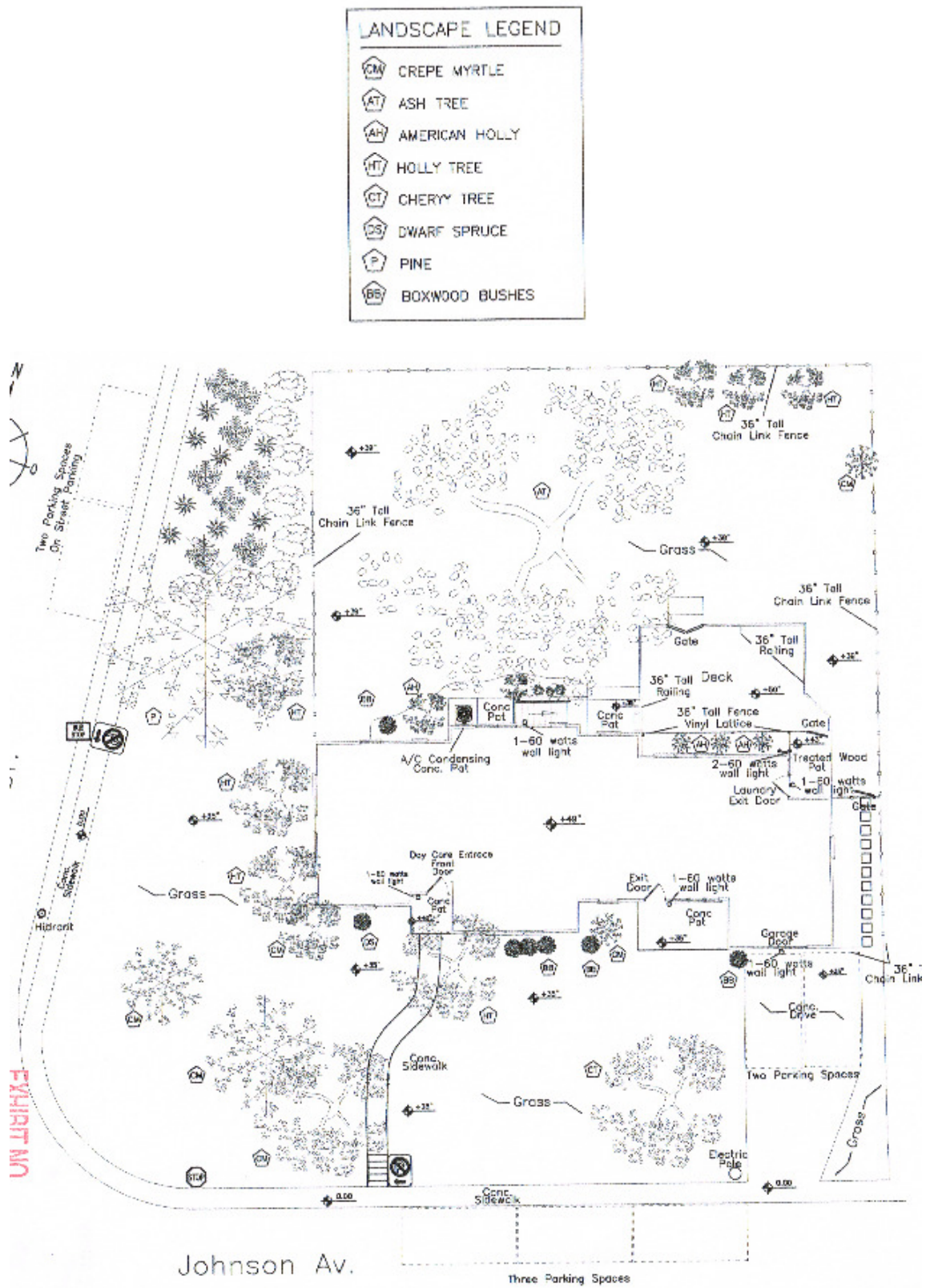
AREA WITH PARTIAL DAYCARE ACCESS	345.72 SQF
AREA WITH FULL DAYCARE ACCESS	568.63 SQF
DAYCARE ACCESS	914.35 SQF

DAYCARE REQUIREMENTS
35 SF/CHILD X 12 LICENSED
CHILDREN = 420 SF REQ'D

LEGEND:

- AREA WITH NO DAYCARE ACCESS
- AREA WITH PARTIAL DAYCARE ACCESS
- AREA WITH FULL DAYCARE ACCESS
- AREA PROPOSED INFANTS ROOM

Site Plan
Exhibit 17(c)



**Landscape Plan
Exhibit 17(b)**

A photograph of the exterior play area, submitted by the Applicant (Exhibit 13(b)) is below:



2. Operations

The day care will operate from Monday through Friday, between 6:45 a.m. and 6:00 p.m. In addition to herself, Ms. Tovar expects to have Mr. Garcon (one of the co-owners) and two non-resident employees at the property. Children's ages will range from infant to pre-school. Exhibit 27.

3. Parking for Employees and Parent Pick-Up and Drop-Off

Ms. Tovar has requested a waiver of three of the minimum number of parking spaces required for the use. A total of five spaces are required on-site: three parking spaces for the non-resident employees and two for the residential use. *Zoning Ordinance*, §59-6.2.4. Parking spaces on the street abutting the property may be counted toward the parking requirement. *Id.* §5-6.2.1.A.

The property has a one-car garage and up to two spaces in the driveway. Staff confirms

that there are up to four on-street parking spaces abutting the property (two along Johnson Avenue and two along Ewing Drive). Four of the spaces, the two in the driveway and the two on Johnson Avenue, are used for parent drop-off and pick up rather than for non-resident employee parking. Exhibit 27, p. 2; Exhibit 10. Staff advises that employees do not park at the site because they are dropped off and picked up by car. Ms. Tovar testified that her husband generally leaves at 5:30 a.m., thus leaving a space in the driveway for parent drop-off as well.

Ms. Tovar has requested a waiver of three spaces for the non-resident employees so that the on-site and on-street parking is available for parent drop-off and pick-up. Exhibit 27, p. 5. She is also requesting a waiver of the requirement for one on-site bicycle space. *Id.*

Mr. Etai Neuman, who lives directly across Johnson Avenue from the subject property, appeared at the public hearing to voice his concerns about parent drop-off along Johnson Avenue in the morning during congested school start times. His concerns are set forth in detail in the next section.

In response to Mr. Neuman's concerns, Ms. Tovar testified that the daycare instructs parents not to park in front of Mr. Neuman's house. T. 12-13. She acknowledged that there is one parent that has not complied with this instruction. T. 21-22. Both she and Mr. Neuman agreed that only one vehicle can proceed on Johnson Avenue if there are cars parked on both sides of the street. T. 23. Ms. Tovar agreed to accept a condition of approval prohibiting parent and employee drop-offs on Johnson Avenue between 7:15 to 8:45 a.m. on weekdays. Drop-offs would be allowed on Ewing Drive and in the driveway of the subject property.

D. Community Response

Mr. Etai Neuman testified at the public hearing because he believes that permitting expansion of the day care will decrease vehicular safety along Johnson Avenue. He lives directly

across from the subject property. According to him, Johnson Avenue is heavily trafficked in the morning because middle school buses must use Johnson Avenue to enter North Bethesda Middle School. In addition, school buses use Johnson Avenue to reach Wyngate Elementary School, where he drives his daughter to school. Middle school buses either have to go south on Ewing and turn right into the middle school or travel west on Johnson and proceed straight to the school. T. 14-15. Elementary school buses also travel west on Johnson Avenue in front of the daycare before turning right to proceed north on Ewing to reach Wyngate Elementary School. T. 14-15.

Mr. Neuman testified that he drives his daughter to Wyngate Elementary School in the mornings. Wyngate's start time is around 8:50 a.m. and he arrives at 8:40 a.m. North Bethesda Middle School buses usually begin coming along Johnson Avenue approximately ½ hour or 45 minutes before then. T. 16.

On days that he leaves at approximately 7:30 a.m. to take his daughter to Wyngate Elementary, he has trouble exiting from his own driveway because of the parked cars from the daycare on both sides of the street and the number of school buses travelling along Johnson Avenue. This problem is particularly acute when there are parents dropping off children at the daycare that are either standing in the road or have their car doors open. He stated that he has almost hit a car three times. He observes that Johnson Avenue is not wide enough to permit two vehicles to pass each other, making exiting his driveway more precarious. T. 22.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*,

§59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a Group Day Care for up to 12 children. *Zoning Ordinance* §59.3.4.4.D.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:²

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: Technical Staff advises that there are no previously approved conditional uses associated with this site. Exhibit 27, p. 15. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;³

Conclusion: This subsection requires an analysis of the standards of the R-60 Zone contained in Article 59-4; the use standards for Group Day Care for 9 to 12 Persons contained in Article 59-3;

² Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

³ The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 21, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 27, pp. 9-15), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6 with the conditions of approval in Part IV of this Report.

c. substantially conforms with the recommendations of the applicable master plan;

Conclusion: The subject property lies within the geographic area covered by the *1990 Bethesda Chevy Chase Master Plan* (Plan). The Master Plan does not specifically discuss the subject site, but it supports having more child day care facilities in the area (*Plan*, p. 155):

Family day care homes and small centers provide accessible child care services through residential neighborhoods within B-CC. By utilizing existing dwelling units, they require minimal additional capital investment to provide services. The family day care homes are currently permitted and the development of small centers should be encouraged.

The Master Plan also includes guidelines for special exceptions (now conditional uses) in residential areas (Plan, pp. 31-33):

3. Protect major highway corridors and residential communities from incompatible design of special exception uses. In the design and review of special exceptions, the following guidelines should be followed, in addition to those stated for special exception uses in the Zoning Ordinance.
 - a. Any modification or addition to an existing building to accommodate a special exception use should be compatible with the architecture of the adjoining neighborhood and should not be significantly larger than nearby structures.
 - b. Front yard parking should be avoided because of its commercial appearance; however, in situations where side or rear parking is not available, front yard parking should only be allowed if it can be landscaped and screened adequately.

* * *

5. Support special exception uses that contribute to the service and health objectives of the Master Plan. The needs and objectives related to child day care and the elderly are discussed in Section 6.2. In general, the Plan endorses provision of child day care, group homes, elder day care, and nursing homes. It is important to meet health needs through hospital services and hospice centers that are appropriately sized to be compatible with surrounding neighborhoods.

Staff concluded that the proposed use substantially conforms to the Master Plan because it is located in an existing single family residence in keeping with the character of the area. Staff further found that it met the community's service needs identified in the Plan. Exhibit 27, p. 16.

The Hearing Examiner agrees with Staff that the child care facility meets the goals of the Master Plan, provided that drop-off of children and employees occur without adverse impact on residential neighborhood. With the conditions of approval listed in Part IV of this Report, she finds that the proposed use will substantially conform to the goals and objectives of the Master Plan.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Conclusion: Staff concluded that the use proposed will not alter the existing character of the neighborhood, which consists primarily of single-family detached homes in the R-60 Zone. Staff reasoned that the day care is located in an existing home that will not be expanded, so the scale and design are in keeping with the area. Staff found that operations would not affect the character of the area because "activities and traffic conditions associated with the use will be limited to specific hours of operation and days of the week, as stated in the recommended conditions of approval." Exhibit 27, p. 17.

The Hearing Examiner generally agrees with Staff, provided that parent drop-off conforms to the conditions of approval in Part IV. She finds credible Mr. Neuman's testimony that it is difficult to exit his driveway because of the bus traffic combined with parent drop-off of children.

The Hearing Examiner obviously cannot control the bus traffic, but can place a condition to avoid drop-off on Johnson Avenue during peak school times. This will be enforced by requiring the Applicant to keep copies of all vehicle license plate numbers of vehicles permitted to drop children off so that she is not held responsible for cars parking on Johnson Street that are not associated with the daycare. With these conditions, the Hearing Examiner finds that the proposed use does not alter the residential character of the surrounding area.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: Staff reports that there are five conditional uses in the neighborhood, all of which are accessory apartments. Staff concluded that the addition of a single day care would not intensify the scope of conditional uses or alter the residential character of the area, presumably because the accessory apartments are generally low-impact, residential uses and because the group day care furthers the goals of the Master Plan.

The Hearing Examiner agrees with Staff's conclusion and notes that the *de minimis* impacts of accessory apartments were recently recognized (in the *2014 Zoning Ordinance*) by removing the requirement that they obtain a conditional use approval provided they meet certain standards in the Zoning Ordinance.⁴

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was

⁴ Accessory apartments that meet the standards of Section 59-3.3.3 of the Zoning Ordinance may be licensed by the Department of Housing and Community Affairs without any separate zoning approval. See, *Montgomery County Code*, §29-19.

approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

- i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or***
- ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and***

Conclusion: The day care proposed here does not require approval of a preliminary plan of subdivision. Exhibit 27, p. 17. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities.

The adequacy of transportation facilities when no subdivision is required is governed by the Planning Board's Guidelines (Guidelines) for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013.⁵ Applications that are expected to generate fewer than 30 trips during a peak hour are exempt from LATR review. The Applicant submitted the schedule of existing parent drop-off and pick-ups shown on the following page. Exhibit 27, p. 12. Staff revised the Applicant's proposal to spread the drop-off and pick-up times for 12 children over longer periods, thus reducing the number of vehicles visiting the site at any one time. *Id.* The Applicant's existing schedule and Staff's revised schedule are on page 20.

⁵ After this application was filed but before the Planning Board's review, the Council adopted a new Subdivision Staging Policy (SSP). *Council Resolution 18-671*, adopted November 15, 2016. The new SSP applies to *preliminary plans* filed after January 1, 2017, but is silent on its application to conditional uses. Because the adequate public facilities determination under the preliminary plan is still valid, the question of which SSP applies is irrelevant except to whether any taxes will be due at the time of building permit. Because any taxes due will be assessed at building permit, the Hearing Examiner need not make a finding on this.

Table 1: Existing Morning Drop-off Operations

Arrival Operations						
Arrival Window			Total Trips			Notes
			In	Out	Total	
Group A	7:00 AM	8:30 AM	4	4	8	Two children, 1 assistant and 1 co-owner are dropped off
Group B	8:30 AM	9:00 AM	3	3	6	Three children are dropped off
Group C	9:00 AM	9:15 AM	1	1	2	Three children are dropped off
Group D	9:15 AM	9:30 AM	1	1	2	One child is dropped off
Cumulative Total			9	9	18	

Notes: 1) One owner lives at the property. The owner's child is one of the eight children in the daycare. Therefore, these people are not included in the trip schedule.

Table 2: Existing Evening Pick-up Operations

Departure Operations						
Departure Window			Total Trips			Notes
			In	Out	Total	
Group A	4:00 PM	4:30 PM	3	3	6	Three children are picked up
Group B	4:30 PM	4:50 PM	1	1	2	one assistant leave site
Group C	5:00 PM	5:30 PM	3	3	6	Three children are picked up
Group D	5:30 PM	6:00 PM	2	2	4	One child and one co-owner are picked up
Cumulative Total			9	9	18	

Note: 1) One owner lives at the property. The owner's child is one of the eight children in the daycare. Therefore, these people are not included in the trip schedule.

Applicant's Drop-Off and Pick-Up Schedule (Above)

Table 4: Estimated Proposed Morning Arrival Operations

Arrival Operations						
Arrival/Departure Window			Total Trips			Notes
			In	Out	Total	
Group A	6:45 AM	8:00 AM	5	5	10	1 co-owner, 1 assistant, 3 children arrive; up to 5 cars
Group B	8:00 AM	9:00 AM	5	5	10	1 assistant and 4 children; up to 5 cars
Group C	9:00 AM	9:30 AM	5	5	10	5 children arrive; up to 5 cars
Cumulative Total			15	15	30	

Note: 1) One co-owner lives at the property; therefore, this trip is not included in the trip schedule.
2) Morning drop-off can occur beyond 9:30 a.m. and, but it cannot begin before 6:45 a.m.

Table 5: Estimated Evening Departure Operations

Arrival/Departure Operations						
Arrival/Departure Window			Total Trips			Notes
			In	Out	Total	
Group A	4:00 PM	4:30 PM	5	5	10	5 children; up to 5 cars
Group B	4:30 PM	5:30 PM	5	5	10	3 children, 2 assistants; up to 5 cars
Group C	5:00 PM	6:00 PM	5	5	10	4 children, 1 co-owner; up to 5 cars
Cumulative Total			15	15	30	

1). One co-owner lives at the property; therefore, this trip is not included in the estimated departure schedule.

Staff's Revised Drop-Off and Pick-Up Schedule (Above)

Staff concluded that the revised schedule would generate fewer than 30 trips in a single hour during the morning or evening peak periods (i.e., 6:30 a.m. to 9:30 a.m. and 4:00 p.m. to 7:00 p.m., respectively). Exhibit 27, Attachment B. Staff also stated (Exhibit 27, p. 12):

The revised staggered schedule allows more flexibility in arrival and departure times for both Staff and children. Staff's revised estimated trips are calculated based on this revised staggered drop-off and pick-up drop-off and pick-up schedule. To reduce the impact on the existing street network, drop-off and pick-up times are organized into three groups with up to five cars in each group. Using this staggered schedule, there is capacity, along the site's frontage on Johnson Avenue and along a portion of Ewing Drive for loading and unloading. Morning drop-off may extend beyond 9:30 AM., but must not begin before 6:45 AM.; afternoon pick-up may begin before 4:00 PM, but must not extend beyond 6:00 PM.

Based on this evidence, the Hearing Examiner finds that the proposed use is exempt from LATR Review. She does require that parking for parent pick-up and drop-off be further restricted as set forth in the next section.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated

with the particular use or created by an unusual characteristic of the site.” Id. As indicated, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Group Day Care facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a Group Day Care facility: (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting. Exhibit 27, p. 18.

Staff concluded that the conditional use as proposed will have no non-inherent adverse impacts (Exhibit 27, p. 18):

With the development conditions as proposed by staff, there are no adverse traffic impacts that would result from the proposed conditional use. The Applicant will use the street frontage along Johnson Ave for drop-off and pick-up of children. Employees do not drive to the site but are picked up and dropped off by automobile. This commuting practice will continue in the future. Outdoor play will not begin before 9:00 a.m. and no outdoor play is permitted after 5:00 p.m. as recommended by staff. No new lighting is proposed and all lighting is adequate and consistent with the residential character of the neighborhood. The site is well landscaped and

a four-foot high chain link fence covered with deciduous vine surrounds the entire rear yard...There are no non-inherent characteristics associated with this proposed conditional use.

Based on Mr. Neuman's testimony at the public hearing, the Hearing Examiner finds that there are two non-inherent physical site characteristics. The first is the property's location at the beginning of the block terminating at the entrance to North Bethesda Middle School. This location causes a steady stream of bus traffic along Johnson Avenue at the same time that drop-off and pick-up are occurring for the daycare. Additional buses use Johnson Avenue to access Wyngate Elementary School to the north. The narrow width of Johnson Avenue, which does not permit two-way traffic, is also a factor. The Hearing Examiner finds persuasive Mr. Neuman's testimony that drop-off for the day care, combined with school bus traffic, makes it difficult and unsafe to negotiate the exit from his driveway in the mornings.

These non-inherent site conditions, however, do not justify denial of the conditional use because the Hearing Examiner may impose conditions of approval designed to alleviate adverse impacts. The Hearing Examiner imposes condition that prohibits parent drop-off along Johnson Avenue from 7:15 a.m. to 8:45 a.m. weekday mornings. Drop-offs may occur during that time, but parents must use the two spaces along Ewing Drive and the space in the driveway to drop-off children during this time frame. The more general schedule recommended by Staff may remain the same. So that this condition is easily enforceable, the Hearing Examiner will also require the Applicant to keep a log of all license plates of cars permitted to drop children off at the daycare and make it available for inspection by inspectors from the Department of Permitting Services upon request. This will also prevent the Applicant from being held responsible for parking along Johnson Avenue that is unrelated to the group day care.

With this condition, the Hearing Examiner finds that the proposed day care will not cause undue harm from traffic in the neighborhood.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: The Applicant does not proposed any alteration or expansion of the existing structure. This criteria is not applicable.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decsision, the conditional use should be approved.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-60 Zone. Development standards for the R-60 Zone are contained §59.4.4.9.B of the Zoning Ordinance. Staff compared the minimum development standards of the R-60 Zone to those provided by the application in a table included in the Staff Report (Exhibit 27, pp. 7), which is reproduced on the next page.

Conclusion: As can be seen from the preceding table (on page 25), the proposed use meets or exceeds the development standards of the R-60 Zone, as provided in Zoning Ordinance §59.4.4.9.B.

Table 1 Development Standards

Development Standards	Required	Proposed
Minimum Lot Area (59.4.4.9.B.1)	6,000 sf	11,580 sf
Minimum Lot Width (59.4.4.9.B.1)		
• At front building line	60 ft.	120 ft.
• At front lot line	25 ft.	120 ft.
Maximum Lot Coverage (59.4.4.9.B.1)	35%	18%
Minimum Building Setback (59.4.4.9.B.2)		
• Front	25 ft.	32 ft.
• Side	8/25 ft.	8/27 ft.
• Rear	20 ft.	35 ft.
Maximum Building Height (59.4.4.9.B.3)	35 ft.	20 ft.
Parking Requirements (59.6.2.4.B)	5 spaces	2 spaces ¹

¹ The residential use requires 2 parking spaces and the proposed group day care facility requires 1 parking space for each employee, thus 3 employee parking spaces. The applicant is providing 2 spaces for the residential use and requesting a waiver under Section 59-6.2.4. B of the Zoning Ordinance for the 3 required employee parking spaces. Staff supports this waiver request.

C. Use Standards for a Group Day Care for 9 to 12 Persons (Section 59.3.4.4.D.2)

The specific use standards for approval of a Group Day Care for 9 to 12 Persons are set out in Section 59.3.4.4.D. of the Zoning Ordinance. Standards applicable to this application are:

1. Defined

Group Day Care (9-12 Persons) means a Day Care Facility for 9 to 12 people where staffing, operations, and structures comply with State and local regulations and the provider's own children under the age of 6 are counted towards the maximum number of people allowed.

Conclusion: The Applicant has one child living in the home, who is considered to be one of the 12 children permitted. Exhibit 7. The proposed use will allow a maximum of 12 children, including the Applicant's child, to use the day care.

2. Use Standards

a. Where a Group Day Care (9-12 Persons) is allowed as a limited use, it must satisfy the following standards:

i. The facility must not be located in a townhouse or duplex building type.

ii. In a detached house, the registrant is the provider and a resident. If the provider is not a resident, the provider may file a conditional use application for a Day Care Center (13-30 Persons) (see Section 3.4.4.E).

iii. In a detached house, no more than 3 non-resident staff members are on-site at any time.

iv. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.

Conclusion: A Group Day Care requires approval of a conditional use in the R-60 Zone. However, the conditional use standards incorporate the limited use requirements, as discussed in the next paragraph.

b. Where a Group Day Care (9-12 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under all limited use standards and Section 7.3.1, Conditional Use.

Conclusion: The Hearing Examiner finds that all of the limited use standards, listed in the preceding paragraph, are satisfied in this case, in that:

- i) The facility is not located in a townhouse or duplex; it is in a detached, single-family home;
- ii) The Applicant is the provider and a resident;
- iii) No more than three non-resident staff members will be on-site at any time; and
- iv) The subject site is not located in the AR Zone.

Furthermore, as discussed in Part III.A., above, and the application meets the “necessary findings” required by *Zoning Ordinance*, §59.7.3.1.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Only a few of these requirements are applicable to the subject application.

1. Site Access Standards

Conclusion: Zoning Ordinance Division 59.6.1 governs “Site Access.” Section 59.6.1.2 states that access requirements do not apply to development in single-family residential zones, such as the R-60 Zone.

2. Parking Spaces Required, Parking Facility Design and Parking Lot Screening

Conclusion: The standards for the number of parking spaces required, parking lot design and parking lot screening are governed by Division 6.2 of the Zoning Ordinance. These standards

govern the minimum number of spaces, design of on-site parking spaces, parking setbacks, and screening of parking areas. *See, Zoning Ordinance* §§6.2.4, 6.2.5, 6.2.9. The primary parking requirement applicable to this application is the minimum number of spaces required for the use.⁶ The Applicant has requested a waiver of three of the required spaces. Exhibit 27, p.1.

The Zoning Ordinance requires a minimum of five parking spaces—one for each non-resident employee and two for the residence itself. *Id.*, 59-6.2.4.B. On-street parking may be counted toward meeting that requirement if parking is permitted on the street and the spaces abut the property. *Id.*, §59-6.2.4.A.5. Staff advises that there is one space in the garage, two spaces in the driveway, two on-street spaces abutting the property on Johnson Avenue, and two on the property's frontage on Ewing Drive, for a total of 7 spaces. The day care presently uses the driveway and the spaces on Johnson Avenue for drop-off and pick-up, thus necessitating a waiver of the three non-resident employee spaces. Exhibit 27, p. 11. Ms. Tovar also states that parking is not needed for the non-resident employees because most are dropped off at work. Ms. Tovar also states that her husband leaves the house by 5:30 a.m., opening up one of the driveway spaces.

The Hearing Examiner may grant a waiver of the required vehicular and bicycle parking spaces if, "adequate parking is provided in a safe and efficient manner." *Zoning Ordinance*, §§59-6.2.10, 59-6.2.1.

Staff recommended the waiver based on Staff's revised, staggered drop-off and pick up schedule described above, on the assumption that most of the morning drop-offs would occur either in the driveway or along Johnson Avenue. Based on Mr. Neuman's testimony, the Hearing

⁶ Requirements governing the design of parking spaces and parking setbacks do not apply to this application because these are not applicable to conditional uses in single-family detached structures. *Zoning Ordinance*, §59-6.2.5.A. Requirements for landscaping and screening parking lots are not applicable because the Applicant is requesting a waiver of the minimum number of spaces required and screening is required for parking lots with five or more spaces. *Id.*, §59-6.2.9.

Examiner, however, imposes a condition prohibiting drop-offs on Johnson Avenue between 7:15 a.m. and 8:45 a.m. on weekdays. With this condition, there will be a total of five parking spaces between those times: one in the garage (for the residence), two in the driveway, and two along Ewing Drive.⁷ The four spaces available for drop-off can accommodate Staff's recommended schedule while at the same time eliminating parking on Johnson Avenue during peak school traffic in the morning. This is because Staff's schedule is spread over a longer time than the narrow period in which drop-off is prohibited along Johnson Avenue.

The Applicant requested a waiver of the required permanent storage space for a bicycle. Staff supported the waiver because construction of the permanent storage space may adversely affect the character of the surrounding neighborhood. Staff reasoned that this construction was not a typical improvement in the neighborhood, and would require additional screening. Exhibit 27, p. 14. Neither Staff nor parents bicycle to the site, and Staff found that any change to this transportation pattern would be "highly unlikely." *Id.*

With the conditions imposed in Part IV of this Report, the Hearing Examiner finds adequate parking will be provided in a safe and efficient manner to support the use, and grants the requested waivers from both the minimum number of parking spaces and the bicycle space.

3. Site Landscaping, Screening and Lighting

Standards for site lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for landscaping and screening are mainly set forth in Division 6.5.

⁷ This assumes that Ms. Tovar will park the residence vehicle in the garage. Even if she does not do so, this still leaves three spaces for parent drop-off between 7:15 a.m. and 8:45 a.m. on weekday mornings. This should still be sufficient because several drop-offs occur outside of that time frame. Ms. Tovar testified that two children come before 8:00 a.m. and the balance of the children do not come until after 8:30 a.m. According to her, no one drops off between 8:00 a.m. and 8:30 a.m. T. 17.

a. Lighting

Zoning Ordinance §59.6.4.4.E. provides:

E. Conditional Uses

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

Division 6.4 does not apply to existing, unmodified lighting:

Division 6.4 applies to landscaping required under this Chapter, the installation of any new outdoor lighting fixture, and the replacement of any existing outdoor fixture. Replacement of a fixture means to change the fixture type or to change the mounting height or location of the fixture. [Emphasis added.]

Conclusion: No new lighting is planned for this conditional use. Staff found the existing lighting “is residential in nature and will not cause a problem with illumination on abutting properties.” Exhibit 27, p. 14. Based on this record, the Hearing Examiner finds that the existing lighting is compliant with the requirements of Division 6.4, regarding lighting.

b. Site Screening and Landscaping

Conclusion: Although some provisions in this portion of the Zoning Ordinance contain very specific requirements, the review of site landscaping and screening for conditional uses in single-family, detached homes is limited to an assessment of compatibility. Zoning Ordinance §59.6.5.2.B. This language is reinforced by Section 59.7.3.1.E.1.b., under which the Hearing Examiner need only find that the proposed use meets applicable general requirements under Article 59-6 “to the extent the Hearing Examiner finds necessary to ensure compatibility. . .”

The existing landscaping and screening includes large mature deciduous trees in the front and rear yards and large evergreen trees along the northern property line, as depicted on the Landscape and Lighting Plan. Exhibit 17(b). Staff found that the existing landscaping will

“continue to ensure the compatibility of this conditional use to the surrounding neighborhood. Exhibit 27, p. 15. The Hearing Examiner agrees and so finds.

4. Signage

Conclusion: No sign is proposed for the conditional use, so the Zoning Ordinance provisions governing signage do not apply. The Hearing Examiner will include a condition prohibiting signs for the group day care on the property.

IV. CONCLUSION AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance, as well as a waiver of the minimum number of parking and bicycle storage spaces. In terms of impacts on the neighbors, it must be remembered that this is not an application to establish a new child care facility on the subject site; rather, it is an application to add 4 children to an already functioning child care facility on the site. Existing issues regarding parking along Johnson Avenue may be resolved with the conditions imposed below.

Based on the foregoing findings and conclusions, the application of Damaris Tovar (CU 17-10), for a conditional use under Section 59.3.4.4.D. of the Zoning Ordinance, to operate a Group Day Care for up to 12 children in her home at 6015 Johnson Avenue, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The day care facility is limited to up to 12 children and 3 non-resident employees.
2. The hours of operation are Monday through Friday from 6:45 a.m. to 6:00 p.m.
3. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m.
4. The Applicant must enter into an agreement with each parent and to specify assigned arrival and departure times that must be staggered into separate groups. Parent arrival and departure must at all times meet the following requirements:

- a. Group A (up to 5 cars) 6:45 a.m. – 8:00 a.m.; 4:00 p.m. – 4:30 p.m.
 - b. Group B (up to 5 cars) 8:30 a.m. to 9:00 a.m.; 4:30 p.m. to 5:00 p.m.
 - c. Group C (up to 5 cars) 9:00 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m. Morning drop-off may extend beyond 9:30 a.m., but must not begin before 6:45 a.m.; afternoon pick-up may begin before 4:00 p.m. but must not extend beyond 6:00 p.m.
 - d. No parent drop-off is permitted on Johnson Avenue on weekdays between 7:15 a.m. and 8:45 a.m.
5. The Applicant must keep a copy of the license plate number of all vehicles permitted to drop-off and pick-up children and employees and must provide this information to inspectors from the Department of Permitting Services upon their request.
 6. The Applicant must not erect a sign on the subject site.
 7. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Group Day Care for children, and must correct any deficiencies found in any government inspection.
 8. The Applicant must not use a public address system of any kind outside the building, and must not allow any amplified music to be played outside the building.
 9. The Applicant must maintain the grounds in a clean condition, free from debris, on a daily basis. Toys which are designed to be kept outdoors are not considered debris.
 10. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 14th day of April, 2017.



Lynn A. Robeson
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c., as amended by Zoning Text Amendment (ZTA) No. 16-16, adopted on February 7, 2017, by Ordinance No. 18-25, effective February 27, 2017. The procedural amendments to the Zoning Ordinance contained in ZTA No. 16-16 have not yet been codified, but you may view them on the Council's website at http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/zta/2017/20170207_18-25.pdf

The Board of Appeals may be contacted at:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

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